Filed 8/24/04 P. v. Flippin CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DORIAN E. FLIPPIN, Defendant and Appellant.	A098086 (Contra Costa County Super. Ct. No. 0102855)

Defendant, convicted of first degree murder and personal use of a weapon, challenges the admission of witnesses' preliminary hearing testimony and claims that trial counsel was ineffective for failing to raise a confrontation clause objection. He also contends the court erred by admitting evidence without sufficient foundation and refusing to instruct on voluntary intoxication. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At trial, several significant witnesses recanted statements they had previously given to the police. One of the witnesses, Garrett Spearman, could not be produced and his preliminary hearing testimony was read to the jury. Police officers had been called at the preliminary hearing to impeach Spearman. While the officers testified at trial about other matters, their impeachment evidence from preliminary hearing testimony was read to the jury.

Defendant was accused of shooting Kenneth Dale on November 8, 1995. The primary trial issue was the killer's identification. Dale had purchased cocaine from

defendant and apparently owed him money. Four or five days before the killing, defendant mentioned the debt to the victim's brother and warned, "Tell your brother when you see him he better have my money or I'm going to bust a cap in him."

Officers responding to the murder scene found Dale lying in the driveway of a Richmond home. Spearman and his girlfriend Alicia Moore were interviewed at the scene and told police they had been inside a nearby residence when the shooting occurred. Dale was shot five times, and the autopsy surgeon opined that three of the wounds were inflicted when Dale was on the ground.

Spearman was arrested at the scene pursuant to a probation violation warrant. Initially he refused to provide details of the shooting until the police agreed to help him with his probation situation. When Officer Dominic Medina told Spearman that he could make no promises, Spearman said he had been in the home of Leslie "Cookie" Ross when Dale and the unidentified shooter argued over Dale's $10 drug debt. The shooter became very agitated and left after Dale laughed at his payment demand. Later, Spearman heard gunshots and went outside to find Dale on the ground.

Officer Medina told Spearman's probation officer that Spearman was assisting in a murder investigation, and the probation officer agreed to inform the court of Spearman's cooperation. Spearman then identified defendant as the shooter, recanted certain details and provided additional ones. He said that after defendant left Cookie's house, Spearman and Moore went outside to work on a car. Defendant returned a short time later and yelled for Dale to come outside. Defendant and Dale argued and defendant again demanded money. Spearman heard gunshots, looked up and saw Dale collapse. Defendant walked closer to Dale, shot him again and fled.

Because Spearman could not be located to testify at defendant's preliminary hearing in 1996, the charges were dismissed. In 2000, Spearman was sentenced to two years in prison. He wrote to the district attorney's office offering to testify against defendant in exchange for an early release and other consideration. Spearman explained he had been unwilling to testify in 1996 because he had been threatened. In an interview with Sergeant Mark Weikel, Spearman repeated his earlier statement that he saw

defendant shoot Dale over a drug debt and advised Weikel that he was still concerned for his safety.

Spearman testified at defendant's February 2001 preliminary hearing. In that testimony, Spearman denied seeing defendant shoot Dale. He said he never heard defendant and Dale argue about a drug debt and that he was inside the house when Dale was shot. When he emerged after the shooting, he did not see defendant. Spearman admitted identifying defendant as the shooter after he was told his probation officer would recommend a release from custody. However, he testified that the details he then provided were untrue. After his imprisonment, Spearman wrote to the district attorney because he was willing to do anything to secure his release. He acknowledged meeting with Sergeant Weikel, but asserted his Fifth Amendment privilege when questioned about the statement he gave. Spearman denied that defendant ever threatened him. He claimed he identified defendant as the shooter because defendant had earlier damaged one of his cars with a baseball bat.

A district attorney's investigator testified at trial that when Spearman arrived for the preliminary hearing, he expressed fear of retaliation. Before that hearing, Spearman admitted he "may not have been entirely truthful" in his interview with Sergeant Weikel. Spearman refused to review his statement to Weikel and requested the assistance of an attorney before testifying.

Alicia Moore testified at trial that she was across the street at Jackline Wilson's house when the shooting occurred. She and Spearman had been working on the car, but were not outside when Dale was murdered. When Spearman was in custody in 2000, he sent his girlfriend to tell Moore that he was in "big trouble" and that Moore should identify defendant as Dale's killer. Moore later lied to Sergeant Weikel to secure Spearman's release.

Moore was impeached with her 2000 statement that she saw defendant shoot Dale. In that statement, Moore explained that on the night of the murder, defendant and Dale argued in Cookie's house over $10. Later that evening, Moore and Spearman were outside when defendant returned, went to the front door and called for Dale. As soon as

Dale stepped off the porch, defendant pulled out a gun, saying, "Yeah, yeah, now what you got to say? Now what you got to say?" Dale called defendant a "punk" and challenged him to shoot. The two men continued to argue and defendant shot Dale four or five times. Defendant fled after telling Moore, "You all ain't seen nothing."

Jackline Wilson testified that she lived across the street from Cookie Ross. Spearman and Moore came to her home only after the shooting and Moore was hysterical. Wilson told the district attorney's investigator that Moore said she had seen "everything." On cross-examination, Wilson was impeached with her statement to police that when Moore and Spearman came to her house after the shooting, they engaged in casual conversation and watched television.

Joy Wolf, Moore's sister, testified that she drove to Richmond and met Moore after the killing. Moore, who was crying and fearful, confided that she had just seen a shooting involving two men who had argued over $10. One man left but returned later and shot the other while she and Spearman were working on their car.

Milton Parker had been inside Cookie Ross's house with Spearman, Moore and Dale. He initially told police that, after Spearman and Moore went outside, someone knocked on the door. Dale left the house and 10 minutes later Parker heard gunshots. Looking out, he saw Dale on the ground.

A week later, Parker informed investigators that defendant had been in Cookie's house talking with Dale before the murder. Parker did not hear the conversation because the two men were whispering. However, at one point he heard defendant say, "Okay, I'll wait til Friday then." Defendant left the house. Shortly thereafter someone knocked at the door and Dale went outside. Parker heard gunshots, looked, and saw that Dale had been shot. He saw no one else. At trial, Parker recanted his statements and testified that he saw and heard nothing because he had been asleep.

The prosecution introduced a redacted version of a letter defendant wrote to another inmate three weeks before trial. The letter stated: " 'Tay' [¶] Whats up my nigga? I hope everythangs cool wit you. Check it out, my trial starts this month so I wanted to touch bases wit you. I dont know if the DA will subpoena you or not but just

in case. Remember I was wit you till about 11 or 11:30 that night. (anytime around then you dont have to be specific cuz it was 6 years ago) After that I got a ride to my baby momma house. I told you thats where I was going thats how you knew. Thats all you know. I know the police spooked niggaz into saying I wasn't wit em so make sure you tell em that. Tell em you didnt know what I couldve done after I left you, but I was wit you till about 11:30. If you can get in contact wit Joe tell him if they subpoena him dont come at all! period! It might not come down to all this but I want niggaz ready just in case. [. . .] I'm takin this shit to trial cuz they got no physical evidence and they witnesses came to court and said they lied on me to get out of jail so I got action at winning. Memorize this shit and throw this letter away. Take care my nigga n keep yo head up. [¶] One Love. [¶] Doe"

Defendant was convicted of first degree murder and the personal use of a firearm, and sentenced to 29 years to life in prison.

DISCUSSION

I. *Ineffective Assistance of Counsel*

At trial, after Spearman was declared unavailable, the jury heard his prior testimony along with that of Officer Medina and Sergeant Weikel recounting Spearman's prior inconsistent statements.[1] Additionally, Medina and Weikel testified at trial about other matters. While cross-examining Medina, defense counsel also asked about Spearman's prior inconsistent statement. Sergeant Weikel was not further cross-examined about Spearman's statement, although counsel had the opportunity to do so.

---

[1] This officers' preliminary hearing testimony was admitted pursuant to Evidence Code section 1294, which provides: "(a) The following evidence of prior inconsistent statements of a witness properly admitted in a preliminary hearing or trial of the same criminal matter pursuant to Section 1235 is not made inadmissible by the hearsay rule if the witness is unavailable and former testimony of the witness is admitted pursuant to Section 1291: [¶] (1) A videotaped statement introduced at a preliminary hearing or prior proceeding concerning the same criminal matter. [¶] (2) A transcript, containing the statements, of the preliminary hearing or prior proceeding concerning the same criminal matter. [¶] (b) The party against whom the prior inconsistent statements are offered, at his or her option, may examine or cross-examine any person who testified at the preliminary hearing or prior proceeding as to the prior inconsistent statements of the witness." All further references are to the Evidence Code except where otherwise indicated.

Under section 1294, the prior inconsistent statement of an unavailable witness may be admitted for its truth if it was previously introduced at a hearing or trial, and meets other statutory requirements. Defendant contends that application of the statute violated his rights under the Sixth Amendment confrontation clause and thus counsel was ineffective for failing to object to the officers' testimony on this ground.

Defendant originally challenged the constitutionality of section 1294 based on the standard enunciated in *Ohio v. Roberts* (1980) 448 U.S. 56. While this appeal was pending, the United States Supreme Court decided *Crawford v. Washington* (2004) 541 U.S. ___, 124 S.Ct. 1354 (*Crawford*), which the parties addressed in supplemental briefing.[2] The *Crawford* court abrogated the reliability test from *Ohio v. Roberts* and replaced it with a new test, focusing on the "testimonial" or "nontestimonial" nature of the out-of-court statement.

While the *Crawford* majority declined to fully define the term "testimonial," it did observe that, "[w]hatever else the terms covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Crawford*, *supra*, 541 U.S. at p.___, 124 S.Ct. at p. 1374.) When a hearsay statement is "testimonial," the confrontation clause bars its use against a criminal defendant unless the declarant is unavailable and the defense previously had the opportunity to cross-examine the declarant. (*Id.* at pp. 1363-1367.)

Defendant focuses his constitutional challenge on the introduction of the preliminary hearing testimony of Officer Medina and Sergeant Weikel recounting Spearman's statements implicating defendant. Defendant points out that two different levels of testimonial hearsay were involved here: (1) Spearman's out-of-court statements

---

[2] Although not decided until after defendant was tried and sentenced, *Crawford* nevertheless applies to defendant's direct appeal. (See *Griffith v. Kentucky* (1987) 479 U.S. 314, 328 ["[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final . . . ."].) We note that defendant initially raised a facial challenge to the constitutionality of section 1294. In his supplemental briefing, defendant argues that section 1294 is unconstitutional as applied in this particular case.

to Medina and Weikel, and (2) the officers' testimony at the preliminary hearing, as read at trial.

First, defendant contends that the officers' preliminary hearing testimony should not have been admitted because, although the officers were subject to cross-examination at the preliminary hearing, they were not unavailable for trial. The argument fails to comport with a clear observation from *Crawford*. As Justice Scalia noted: "Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." (*Crawford*, *supra*, 541 U.S. at p.___, 124 S.Ct. at p. 1369, fn. 9.) Here, the officers were cross-examined at the preliminary hearing about Spearman's prior inconsistent statements *and* were available at trial for further cross-examination. Defendant's confrontation rights were amply protected and no confrontation clause violation occurred.

Second, defendant asserts a separate basis for excluding Sergeant's Weikel's preliminary hearing testimony. Defendant contends he was denied his right to cross-examine Spearman regarding his statement to Weikel and, thus, the sergeant's testimony recounting Spearman's statement is inadmissible under *Crawford*.

At the preliminary hearing, Spearman acknowledged writing to the district attorney's office in 2000, and later being interviewed by Sergeant Weikel. When asked by the prosecutor if he told Weikel about the murder, Spearman asserted his Fifth Amendment privilege. Spearman was more forthcoming on cross-examination. He said he lied in 1995 when he told Officer Medina he had seen the shooting. Spearman explained he later wrote to the district attorney because he had just been sentenced to prison and was "fairly desperate." Willing to do "just about anything to get out of custody," he wrote to ask for help in obtaining his release. Defense counsel then asked, "So you were basically offering for some type of consideration on the part of the district attorney to be able to give them a suspect?" When Spearman asserted the Fifth Amendment in response, the trial court told defense counsel, "You kind of made your point." Spearman later explained that when he wrote the letter he had custody of his son and was very concerned that he could not care for the child while incarcerated.

Spearman acknowledged that he spoke with the prosecutor and an investigator before the preliminary hearing. Defense counsel asked, "And isn't it true that you told them that you had given false testimony to an officer in May or June [of] 2000 when they came to talk to you?" Spearman refused to answer, asserting the Fifth Amendment. The following colloquy ensued:

"Q. Did you ever receive any threats from [defendant]?

"A. No.

"Q. And you stated on direct examination that you are not afraid of testifying because of anything that he is going to do to you, correct?

"A. No.

"Q. You stated that you did have other fears though, correct?

"A. Yes.

"Q. Isn't it true that your other fears [about testifying] are fears that . . . the district attorney is going to try to charge you with perjury?

"A. Yes.

"Q. Isn't it true that the district attorney and [the investigator] told you when you told them that you were going to admit that you had given false testimony to Officer Weikel, that you might be charged with perjury? [¶] . . . [¶]

"A. Yes.

"Q. And you were afraid that you would be charged with perjury if you admitted that you lied to Officer Weikel in June of 2000, correct[]?

"A. Yes."

On redirect, Spearman admitted he also lied to the police in order to resolve his probation case and that the police accepted his story. In 2000, he again believed the police and the district attorney would accept anything he said without verifying it.

Defense counsel argued in the trial court that, because of Spearman's invocation regarding the 2000 statement, she was unable to cross-examine him in order to establish that Spearman had lied to Sergeant Weikel. As a remedy, defendant sought to strike Spearman's testimony relating to the statement and to exclude Sergeant Weikel's related

preliminary hearing testimony. The trial court observed that the only questions Spearman declined to answer on cross-examination concerned whether he lied to Weikel. The court stated, "However, the inference is clearly there, is that he was asking for consideration, that he was trying to get out of prison, and that is all in the examination."

Under the reasoning of *Crawford*, *supra*, 541 U.S. ___, 124 S.Ct. 1354, as it is pertinent here, the right of confrontation is satisfied if the defendant had a previous opportunity to cross-examine the declarant and the declarant is later unavailable for trial. The right to confront and cross-examine permits a criminal defendant to effectively challenge the truthfulness of direct testimony and pursue impeachment of a witness so as to "expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." (*Davis v. Alaska* (1974) 415 U.S. 308, 318.) Nevertheless, the confrontation clause only "guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (*Delaware v. Fensterer* (1985) 474 U.S. 15, 20.)

Courts must ensure that a witness's invocation of the Fifth Amendment does not " 'effectively . . . emasculate the right of cross-examination itself.' [Citation.]" (*Delaware v. Fensterer*, *supra*, 474 U.S. at p. 19.) "Where a witness refuses to submit to proper cross-examination regarding material issues, the striking out or partial striking out of direct testimony is common, and has been allowed even where the result was to deprive a criminal defendant of the fundamental constitutional right to testify in his own behalf." (*Fost v. Superior Court* (2000) 80 Cal.App.4th 724, 736.) In determining the propriety of striking testimony, the ultimate questions on appeal are " 'whether the defendant has been deprived of his right to test the truth of the direct testimony,' [citations], and whether answers to the particular questions 'would . . . have undermined the government's case.' [Citations.]" (*United States v. Seifert* (9th Cir. 1980) 648 F.2d 557, 562.) A witness's refusal to answer "some questions may not be as seriously prejudicial as a total refusal to submit to cross-examination, and the [trial court] has discretion to let the direct examination stand where the unanswered question was

relatively unimportant. [Citations.]" (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation At Trial, § 228, p. 296.)

The Sixth Amendment was satisfied here. Spearman admitted that he offered to identify Dale's killer in exchange for consideration, and that he feared being charged with perjury if he admitted lying to Sergeant Weikel. Further, the district attorney's investigator also testified that Spearman admitted, before the preliminary hearing, that he may have been less than truthful when interviewed by Weikel. Although Spearman was called as a prosecution witness, he testified favorably for the defense. His invocation of the Fifth Amendment as to three particular questions did not foreclose cross-examination regarding the truthfulness of his statement to Sergeant Weikel. Based on the evidence set forth above, defense counsel argued to the jury that Spearman was "trying to scam the police and the D.A. just to get out of jail early and get his restitution taken care of." Counsel asserted that Spearman's lies secured his release from custody in 1995 and argued, "[Y]ou really can't blame the guy for trying again when he ends up in state prison. Even he, I think, said at the preliminary hearing, [w]ell, yeah, it did, it worked before."

The trial court did not err in refusing to strike the portions of Spearman's preliminary hearing testimony concerning his statement to Sergeant Weikel.[3] Spearman's testimony on this topic was admitted in compliance with the *Crawford* requirements of unavailability and prior opportunity to cross-examine. Accordingly, there was no error under *Crawford* in admitting Sergeant Weikel's preliminary hearing testimony recounting Spearman's prior inconsistent statements.

---

[3] Defendant also asserts that the trial court lacked the discretion to allow the jury to learn of Spearman's invocation of his Fifth Amendment rights. He asserts the court violated section 913, which prohibits the court or counsel from commenting on the exercise of privilege and precludes the jury from drawing any inference therefrom. However, defendant not only failed to object, he told the court, "In light of the Court's ruling, I think at a minimum the jury needs to hear that he took the Fifth." Defendant also agreed that the court should craft an instruction permitting the jury to draw an adverse inference from Spearman's invocation. Defendant has waived any claim that the court violated section 913. (See generally *People v. Zapien* (1993) 4 Cal.4th 929, 979.)

To establish an ineffective assistance of counsel claim, a defendant must show that counsel's performance was deficient because he or she failed to act in a manner expected of reasonably competent attorneys acting as diligent advocates. Defendant must also establish prejudice by showing that, in the absence of counsel's failings, a more favorable outcome would have resulted. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215-218.) Because the trial court's ruling here did not violate the confrontation clause, defendant's ineffective assistance claim fails.

II. *Foundation for Letter Seized at the Jail*

Defendant contends the trial court erred by admitting a letter purportedly authored by defendant, without a sufficient showing of its authentication. His claim is without merit.

The proponent of a writing must establish authenticity by a preponderance of the evidence. (§ 403, subd. (a)(3); *People v. Herrera* (2000) 83 Cal.App.4th 46, 61.) The Evidence Code details how a document may be authenticated. (§§ 1410-1421.) In particular, section 1421 provides that "[a] writing may be authenticated by evidence that the writing refers to or states matters that are unlikely to be known to anyone other than the person who is claimed by the proponent of the evidence to be the author of the writing." However, as the court in *People v. Gibson* (2001) 90 Cal.App.4th 371, 383, explained, "The law is clear that the various means of authentication as set forth in Evidence Code sections 1410-1421 are not exclusive. Circumstantial evidence, content and location are all valid means of authentication. [Citations.]"

Here, the letter was sent through the inmate mail system and confiscated by a deputy assigned to the facility in which defendant was housed. The letter was addressed to inmate Conte Tillis, and bore a return address of "Dorian Flippen, MDF, Module A." Defendant identified addressee Tillis and Joe Ware as alibi witnesses in 1995. The letter directed Tillis to find "Joe" and tell him not to come to court if subpoenaed by the prosecution. Neither Tillis nor Ware confirmed defendant's alibi in 1995, which is consistent with information in the letter.

The author of the letter needed to account for his whereabouts "till about 11 or 11:30 that night," suggesting he knew the time of the murder. After the murder, defendant went to the apartment of Adriane McCoy, the mother of his son. The author of the letter knew this fact, writing to Tillis, "After that I got a ride to my baby momma house. I told you thats where I was going thats how you knew." In a reference that describes Spearman's preliminary hearing testimony, the author wrote, "[T]hey witnesses came to court and said they lied on me to get out of jail so I got action in winning." The author was also aware that the police had no physical evidence linking defendant to the murder.

The prosecutor represented that his supervisor could not recall making the 13-year offer referenced in the letter. Even if such an offer was not made, however, the letter contains ample details known only to defendant. The content of the letter combined with the return address on the envelope were sufficient to support the trial court's finding of authenticity. The court did not abuse its discretion in admitting the letter.

III. *Voluntary Intoxication Instructions*

Defendant contends the trial court erroneously rejected instructions pertaining to voluntary intoxication.[4] (CALJIC Nos. 4.21, 4.22.) He argues that a properly instructed jury could have found him unable to premeditate and deliberate because of his intoxication.

A trial court has no duty to instruct the jury on a defense unless it is supported by substantial evidence. (*People v. Curtis* (1994) 30 Cal.App.4th 1337, 1355.) "Substantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive. [Citation.]" (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8.) With regard to specific intent crimes, a defendant is entitled to

---

4 Defendant requested CALJIC Nos. 4.21 and 4.22. Defendant modified CALJIC No. 4.21 as follows: "In the crime of murder, of which the defendant is accused, a necessary element is the existence in the mind of the defendant of the mental state of premeditated and deliberate intent to kill, and the mental state of malice. [¶] If the evidence shows that the defendant was intoxicated at the time of the alleged crime, you should consider that fact in deciding whether defendant had the required mental states. [¶] If from all the evidence you have a reasonable doubt whether the defendant formed a mental state, you must find that he did not have such mental state."

instructions on voluntary intoxication only when there is substantial evidence both that the defendant was intoxicated and that the intoxication affected the actual formation of specific intent. (*People v. Williams* (1997) 16 Cal.4th 635, 677.)

For example, in *Williams*, *supra*, a witness testified that the defendant was "probably spaced out" on the morning of the charged killings, and the defendant made statements to police that around the time of the killings, he was "doped up" and "smokin' pretty tough then." (16 Cal.4th at p. 677.) The Supreme Court held that the trial court properly refused to instruct on voluntary intoxication. Characterizing the evidence of voluntary intoxication as "scant," the Supreme Court reasoned that even if that evidence qualified as substantial, there was no evidence that the intoxication had any effect on the defendant's ability to formulate intent. (*Id.* at pp. 677-678.)

In *People v. Ivans* (1992) 2 Cal.App.4th 1654, the court concluded the evidence was insufficient to support an intoxication instruction in spite of defendant's own testimony that, at the time of the shooting, he had been high on speed for a month and had been awake for three or four days. (*Id*. at p. 1662.) The court concluded there was insufficient evidence to show that defendant's drug use affected his mental state, noting the defendant provided detailed testimony about his activities at the time of the offense and other witnesses did not observe any specific symptoms of drug usage. (*Ibid*.)

Similarly, in *People v. Greenberger* (1997) 58 Cal.App.4th 298, the trial court's refusal to instruct on the effects of intoxication was upheld as proper even though evidence was presented that the defendants had consumed a bottle of wine before the murder and one of the defendants was described as drunk. (*Id*. at p. 378.) The court noted there was no evidence that any defendant drank enough wine to affect his mental state. (*Ibid*.)

Defendant argues that such cases are of "limited utility" because they address the mens rea for murder generally. He notes that in *People v. Wolff* (1964) 61 Cal.2d 795, the Supreme Court observed that a deliberate and premeditated murder requires "more understanding and comprehension of the character of the act than the mere amount of thought necessary to form the intention to kill." (*Id.* at p. 822.) Because of this

distinction, defendant argues that a more generous substantial evidence threshold should apply when intoxication bears on premeditation and deliberation. Even assuming *arguendo* that defendant is correct, that threshold is not met here.

As evidence of defendant's intoxication, he points to comments made by Moore in her 2000 interview with Weikel. In the first exchange Weikel asked, "[Defendant] wanted [the money] from Sonny?" Moore answered, "Yeah, but Dorian had been up like three days, like snorting cocaine and crank and drinking." Weikel then asked Moore if on "the day of the shooting," defendant had been using drugs:

"SGT. WEIKEL: Okay. But you had seen Dorian using cocaine—

"MS. MOORE: Yeah.

"SGT. WEIKEL: —around that period?

"MS. MOORE: Snorting, yeah, smoking weed and drinking."

Moore did not specify when defendant actually drank or consumed drugs, other than sometime during a three-day span before the shooting and "around the period" of the day of the murder. Nor did she indicate the amount of drugs or alcohol consumed. As in *Williams*, *supra*, 16 Cal.4th 635, the evidence of intoxication here is scant at best.

Nor is there evidence that the intoxication had any effect on the defendant's ability to form the required mental state. Moore indicated that defendant left the house specifically to retrieve his gun. He returned with the gun and confronted Dale, saying, "Yeah, yeah, now what you got to say?" Spearman reported that defendant walked over to the injured Dale as he lay on the ground and shot him again. Defendant then told Spearman and Moore, "You all ain't seen nothing," suggesting defendant was unafraid to shoot Dale in front of two witnesses because he believed he could control them, not because his reasoning was impaired.

After the murder, defendant went to McCoy's apartment. McCoy testified that there was nothing unusual about defendant's demeanor or tone of voice and that he "seemed normal." Although defendant threw a fire extinguisher through her window because she would not admit him, McCoy testified that this conduct was "normal for him," and that defendant had broken her window on another occasion during an

argument. Based on this record the court did not err in refusing to give intoxication instructions.

DISPOSITION

The judgment is affirmed.

_____
Corrigan, Acting P.J.

We concur:

_____
Parrilli, J.

_____
Pollak, J.